86-791

No. _____

In the Supreme Court of the United States

October Term, 1986

DAVID ASHBURN GREY

Petitioner,

v.

THE STATE BAR OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI TO THE STATE BAR COURT OF CALIFORNIA

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2049 Century Park East
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Attorney for Petitioner

QUESTION PRESENTED

Whether the operation of Standard (2), adopted pursuant to the Rules of Professional Conduct of the State of California, denied petitioner Freedom of Speech, Due Process of Law, and the Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the United States Constitution, because petitioner was disciplined pursuant to Standard (2), which has the purpose and effect of prohibiting all advertisements containing testimonials about or endorsements of a lawyer.

INTERESTED PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, Mark Oring, petitioner's former law partner, has an interest in the case since he stipulated with the State Bar that he would be bound by the ultimate resolution of petitioner's case.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DAVID ASHBURN GREY

Petitioner,

v.

THE STATE BAR OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI
TO THE STATE BAR COURT OF
THE STATE OF CALIFORNIA

David Ashburn Grey prays that the Court issue a writ of certiorari to review the decision and order of the State Bar Court of the State of California filed October 23, 1985.

OPINIONS BELOW

On July 15, 1986, the Supreme Court of the State of California denied petitioner's Petition to Review the decision and order of the Review Department of the State Bar Court of the State of California, with two Justices voting to grant the petition. (App., infra, 1a). The unpublished decision and order of the State Bar Court was filed on October 23, 1985, and is attached as Appendix "B". 2a-15a. On December 5, 1984, a Hearing Panel of the State Bar Court rendered an unreported oral opinion, a copy of which is set forth as Appendix "C". 16a.

JURISDICTION

The Order of the California Supreme Court, denying petitioner's duly filed Petition for Review was filed on July 15, 1986. 1a. On October 2, 1986, Justice

Sandra Day O'Connor extended petitioner's time to file a Petition for Writ of Certiorari to and including November 12, 1986, Appendix "D". 17a.

Petitioner invoked the First and Fourteenth Amendments to the United States Constitution in the State Bar Court, and when he petitioned the California Supreme Court for a Writ of Review. Petitioner asserted that his advertisement containing an endorsement is protected by the Free Speech provisions of the First and Fourteenth Amendments. Petitioner also contended that Standard (2), adopted pursuant to Rule 2-101(D) of the Rules of Professional Conduct is, as applied, unconstitutionally vague and broad violating the Due Process and Equal Protection provisions of the Fourteenth Amendment, and the Freedom of Speech

provisions of the First and Fourteenth Amendments. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF THE STATE OF CALIFORNIA

1. Rule 2-101 of the Rules of Professional Conduct of the State of California is set forth as Appendix "E". 18a-23a. The Rules are found in Calif. Civ. and Crim. Court Rules, Vol. 23, Part 2, pp. 275-276 (West 1986).

2. Standard (2), adopted by the Board of Governors of the State Bar pursuant to Rule 2-101(D) provides:

> (2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate Rule 2-101, Rules of Professional Conduct.

STATEMENT OF THE CASE

Petitioner has been an active member in good standing of the California State Bar since 1975. As a partner in the law firm of Grey & Oring, he caused a radio spot advertisement to be broadcast on June 1, 1981 over radio station KPRZ, located in Los Angeles, California. The advertisement consisted of the following statement by a former client of the firm.

> "I was rear-ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harassed me, just all in all gave me a bad time. I contacted an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey & Oring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and

> suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I would definitely go back to Grey & Oring. I certainly do believe that."

Said message was followed by an announcer adding:

> "Grey & Oring. That's G-r-e-y & Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

In response to an inquiry from a Special Investigator of the State Bar petitioner sent a transcript of the radio spot, together with a letter explaining that the person speaking in the advertisement was a client named Sharon Schulte, who was relating the course of conduct of a personal injury and bad faith insurance case which petitioner's office

handled on her behalf. Petitioner's letter set forth the facts surrounding the occurrence of the event and the litigation which followed, together with the ultimate result.

The Special Investigator asserted that the advertisement violated the Rules of Professional Conduct because it contained a testimonial or endorsement, i.e., the following statement by Ms. Schulte:

> If I had any legal problem, car accident or anything, I would definitely go back to Grey & Oring. I certainly do believe that."

Following a hearing before Referee Jerry Craig, petitioner received a letter from the State Bar's senior trial counsel dated March 23, 1983, informing him that Referee Craig had determined that there were insufficient facts to warrant further

proceedings, and that the referee had made the following findings:

> "(1) The radio advertisement in question constitutes a 'testimonial' as that term is used in Rule 2-101(D) of the Rules of Professional Conduct;
>
> (2) That Rule 2-101(D) is unconstitutional; and
>
> (3) That said 'testimonial' is not actually misleading.

The letter added however, that "an Investigation Department Referee is not legally authorized to determine the constitutionality of the Rules of Professional Conduct," and therefore, "a request for further proceedings will be submitted to the Board of Governers' Committee on Adjudication and Discipline at their next regularly scheduled meeting."

On December 5, 1984 a Hearing Panel consisting of three referees of District 7 of the State Bar Court heard the

matter. The record consisted solely of stipulations and arguments. The parties stipulated to the contents of the advertisement, and that petitioner was aware of Rule 2-101(D) when he ran the advertisement. Finally the parties stipulated as follows:

> The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded.

In response to questioning from the Hearing Panel, counsel for the State Bar stated that respondent was "merely speculating" as to the effect of the advertisement. She acknowledged that there had not been any complaint about the advertisement, and that respondent had no evidence that anyone had actually been

misled.

Respondent conceded that testimonials and endorsements are appropriate for general commercial advertising but contended that Standard (2) was a necessary prophylactic requirement because endorsement advertisements by lawyers "are more misleading" than similar advertisements "in a strictly commercial setting." Respondent explained:

> [T]he [State Bar] is trying to give some guidance as to what truthful, understandable, straightforward legal advertising is, and that the feeling is that the use of testimonials in this context does not meet with the spirit of that intent.

The Hearing Panel unanimously found Standard (2) unconstitutional in two respects, saying:

> [F]irst, because it shifts the burden of proof from the State Bar of bearing the burden of proof that the attorney has been guilty

> of unprofessional conduct, to the [petitioner], requiring him to disprove his culpability; secondly, because there is no standard in regard to what an attorney must or must not do in order to rebut any presumption of violation of Rule 2-101. 16a.

The Hearing Panel added that it "need not and does not make a determination that the testimonial here involved is or is not misleading." 16a.

On October 23, 1985 the Review Department of the State Bar Court rejected the recommendation of the Hearing Panel, by a vote of 5 to 4, with three referees abstaining. The Review Department found factually that the statements Sharon S. made in the advertisement "were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring." 9a. The Department concluded however that the presumption found in

Standard (2), is constitutional as applied to petitioner and that petitioner "failed to present evidence sufficient to rebut said presumption." 10a-11a. The Review Department ordered petitioner "publicly reproved." 11a.

Two referees gave their reasons for dissenting. Referee Hinerfeld stated that petitioner's advertisement was constitutionally protected under Bates v. State Bar of Arizona, 433 U.S. 350 (1977). He stated that truthful testimonials from satisfied clients is "the kind of information that the public is likely to want incident to selecting a lawyer," and concluded that Standard (2)'s presumption "is irrational and unreasonably frustrates the public's right to know," guaranteed by the federal and state constitutions. 14a-15a.

Referee Ching dissented on the ground that the "record contains insufficient evidence to sustain the findings of culpability." He also found that the presumption amounts to a "conclusive presumption," and "is in conflict with other sections of Rule 2-101, Rules of Professional Conduct." 15a.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The decision by the State Bar Court of the State of California conflicts irreconcilably with Bates v. State Bar of Arizona, 433 U.S. 350 (1977), as explained and expanded in In re R.M.J., 455 U.S. 191 (1982) and Zauderer v. Office of Disciplinary Council, 471 U.S. ____, 105 S.Ct. 2265 (1985). Indeed, the conclusion that Standard (2), as applied to petitioner, is violative of the First Amendment flows a

fortiori from Zauderer.

This case raises significant and recurring problems as to whether lawyer advertisements containing client endorsements may be prohibited. Commentary following Rule 7.1 of Model Rules of Professional Conduct, proposed by the American Bar Association Commission on Evaluation of Professional Standards, suggests that the Rule would prohibit such advertisements. In re R.M.J., supra, at 201 n.14. Without contrary guidance from this Court, States are likely to adopt the American Bar Association's suggestion that "client endorsements" are unethical and not constitutionally protected.

1. Petitioner has been ordered publicly reproved for soliciting business through a public advertisement containing a genuine endorsement by a grateful client.

The Review Department of the State Bar Court found that the client's statements "were extemporaneous and were true and reflected her actual experience as a client" of petitioner's firm. 9a. The State Bar Court did not find that the endorsement was misleading or deceptive. Instead, it relied upon the prophylactic Standard (2), which presumed that endorsement advertisements are violative of the Rules of Professional Conduct. California has thus given to its rules concerning endorsement advertising the kind of broad reading that is prohibited by Bates, In re R.M.J., and Zauderer, Zauderer at 2277.

Reliance on Standard (2) is constitutionally impermissible however, because the State Bar failed to prove that the Standard "directly advances a substantial governmental interest."

Respondent acknowledges that testimonial and endorsement advertisements are generally constitutionally protected, but contends that lawyers may be prohibited from utilizing them, because legal advertising allegedly "is different in kind from the problems presented by advertising generally." Zauderer found an identical argument unpersuasive saying:

> Assessment of . . . information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be. The qualitative distinction the State has attempted to draw eludes us.

Id. at 2279.

Zauderer held that an attorney may not be disciplined for soliciting legal business by public advertising containing truthful and non-deceptive illustrations and legal advice, explaining:

> The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistance that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes.

Id. at 2278.

Similarly Standard (2) may not be applied to punish petitioner, because his particular advertisement has none of the vices that allegedly justify Standard (2).

The Federal Trade Commission has given its blessing to endorsement advertisements which comply with its standards, set forth in 16 C.F.R., Part 255.[1/] Under this regulation endorsements must reflect "the honest opinions, findings, beliefs, or experience

---

1/ Petitioner's advertisement complied fully with the FTC rule.

of the endorser." 16 C.F.R. § 255.1(a). Advertisements presenting endorsements by what are represented, directly or by implication, to be "actual consumers" should "utilize actual consumers." 16 C.F.R. § 255.2(b). The experience of the FTC is instructive, Zauderer at 2279, n. 13, 2281, and it undermines the "justification" for Standard (2).

California has not presented evidence or authority of any kind for its assumption that endorsement advertisements by lawyers are potentially deceptive or misleading. At bottom, California's arguments "amount to little more than unsupported assertions." Zauderer at 2281.

Plainly, this Court need not uphold Standard (2), simply because the Board of Governors of the State Bar assumed that a public endorsement of an attorney by

a client is out of harmony with "the spirit" of the Rules of Professional Conduct. Supra, 10. As Landmark Communications Inc. v. Virginia, 435 U.S. 829, 843 (1978) made clear, a reviewing court's duty in First Amendment cases is "to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression."

The relief petitioner seeks is narrow. He seeks only the invalidation of Standard (2), leaving intact all of California's Rules of Professional Conduct. Striking Standard (2) will leave intact subdivision (B) of Rule 2-101 which prohibits in-person solicitation. See Ohralik v. Ohio State Bar Ass'n, 436 U.S.

447 (1978). Similarly, the elimination of Standard (2) does not deprive the State Bar of its power to discipline a lawyer whose advertisement contains any false, deceptive, confusing or misleading matter. In short, the elimination of Standard (2) would simply place the burden on the State Bar to prove its case. See Philadelphia Newspapers Inc. v. Hepps, 106 S.Ct. 1558, 1564 (1986).

Because petitioner's First Amendment rights have been infringed by the application of Standard (2) to his commercial speech, it must be declared unconstitutional.

2. The application of Standard (2) to petitioner's advertisement also denied him procedural due process of law because it imposed upon him the impossible burden of rebutting the presumption that

his advertisement violated Rule 2-101 of the Rules of Professional Conduct. In argument before the Hearing Panel, counsel for the respondent conceded that she didn't think there was any evidence that she could put on to prove that anyone was misled by the endorsement contained in petitioner's advertisement. It would appear to follow, a fortiori, that there was no evidence petitioner could produce to prove that nobody was mislead by the endorsement. As the Hearing Panel found "there is no standard in regard to what an attorney must or must not do in order to rebut" the presumption that an advertisement containing an endorsement violates the Rules of Professional Conduct. 16a. In reality Standard (2) amounts to a "conclusive presumption," as Referee Ching found. 15a. See, Vlandis v. Kline, 412

U.S. 441, 446-454 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644-648 (1974); Elfbrandt v. Russell, 384 U.S. 11, 17-19 (1966).

Shifting the burden of proof where speech is involved has always met strict scrutiny. See, Speiser v. Randall, 358 U.S. 516, 526 (1958) ("The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding - inherent in all litigation - will create the danger that the legitimate utterance will be penalized."); Freedman v. Maryland, 380 U.S. 51, 58 (1965) ("First, the burden of proving that the film is unprotected expression must rest on the censor"); Matter of Marcus, 107 Wis.2d 560, 320 N.W.2d 806 (1982) (An interpretation of

the rules which would authorize the allocation of the burden of proof upon attorneys in disciplinary proceedings would be unconstitutional and contrary to the rules in Bates and R.M.J.)

Where, as here, petitioner was not given a meaningful opportunity to present evidence in his defense, the proceedings violate due process.

3. The application of Standard (2) to petitioner's advertisement also denied him the equal protection of the laws guaranteed by the Fourteenth Amendment, which requires that all persons similarly situated should be treated alike. Plyler v. Doe, 427 U.S. 202, 216 (1982).

As in Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972), petitioner's Equal Protection claim "is

closely intertwined with First Amendment interests." California permits truthful endorsement advertisements, except when made by a lawyer. The "crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." Mosley at 95. Where, as here, First Amendment rights are implicated the justification for differential treatment "must be carefully scrutinized." Id. at 99. Mosley rejected Chicago's argument that, although it permitted peaceful labor picketing, it was free to prohibit all non-labor picketing because allegedly non-labor picketing was more prone to violence than labor picketing. The Court stated that this assumption involved "judgments appropriately made on an individualized basis, not by means of broad

classifications." Id. at 101. The Court stated that freedom of expression and its intersection with the guarantee of equal protection would rest on a soft foundation if distinctions could be made based on undifferentiated fear or apprehension. Id.

Even if Standard (2) did not implicate petitioner's rights under the First Amendment, it would still be violative of the Equal Protection Clause because the record in this case does not reveal any rational basis for believing that endorsement advertising by lawyers poses any threat greater than similar advertising by others.

In City of Cleburne Tex. v. Cleburne Living Center, 105 S.Ct. 3249 (1985) the Court found unconstitutional, as applied, the City's zoning ordinance, which

required a special use permit for homes for the mentally retarded, while other care and multiple dwelling facilities were freely permitted. The Court acknowledged the validity of the City's contention that the mentally retarded as a group are different from others, and that in this respect they may be different from those who would occupy other facilities that would be permitted in the particular zoning area without a special permit. But, the Court added, this difference was largely irrelevant because the record did not "reveal any rational basis for believing that the . . . home would pose any special threat to the City's legitimate interests." Id. at 3259. Accordingly, the Court affirmed the judgment below insofar as it held the ordinance "invalid as applied in this case." Id. The Court rejected each of the

grounds relied upon by the City to justify its ordinance.

First, the Court rejected the City's concern with the negative attitudes of the majority of property owners near the facility, as well as with the fears of elderly residents of the neighborhood, stating:

> [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for treating a home for mentally retarded differently from apartment houses, multiple dwellings and the like.

Id. at 3259.

The Court was unimpressed with the City's concern with the size of the home and the number of people that would occupy it. Pointing to the district court's finding that if the residents were not mentally retarded there would be no

restriction on the number of people who could occupy the facility, the Court stated:

> The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others, but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the . . . home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.

Id. at 3260.

Finally, the Court rejected the City's contention that its ordinance was aimed at avoiding concentration of population and at lessening congestion of the streets. The Court stated:

> These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed

> worry about fire hazards, the security of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home [for the retarded], for the special use, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

Id. at 3260.

In the case at bar, Rule 2-101(D) gave the Board of Governors authority to formulate and adopt standards as to what communications will be presumed to violate the Rules of Professional Conduct. On nothing more than a hunch, the Board of Governors decided that an advertisement which contains testimonials about or endorsements of a lawyer is presumed to be unethical and violative of the Rules of Professional Conduct. Because the Board of Governors, acting on behalf of the State, failed to establish that there is an

appropriate governmental interest suitably furthered by prohibiting endorsement advertisements by lawyers, while permitting such advertisements by others, Standard (2) violates the Equal Protection Clause.

The State Bar Court violated petitioner's rights under the Equal Protection Clause, when it invoked Standard (2) as the justification for ordering the public reproval of petitioner.

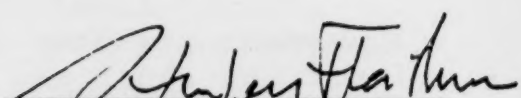
CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: October 27, 1986

Respectfully submitted,

STANLEY FLEISHMAN
A Professional
Corporation

By: 
STANLEY FLEISHMAN
Attorney for
Petitioner

1372A Sys./0068A Arch.

No. L.A. 32152

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

DAVID ASHBURN GREY

v.

STATE BAR OF CALIFORNIA

Petition for writ of review DENIED.

Bird, C.J. and Grodin, J., are of the opinion the petition should be granted.

SUPREME COURT
FILED
JUL 15 1986
Laurence P. Gill,
Clerk

_____
Deputy

/s/
Chief Justice

APPENDIX "A"
1a

STATE BAR COURT

THE STATE BAR OF CALIFORNIA

In the Matter of	)	
	)	
David A. Grey &	)	84-O-131 LA
Mark H. Oring	)	
	)	
A Member of the State Bar	)	

I, Judy Duffield, hereby certify that I am Clerk of the State Bar Court, and that as such, I am the custodian of records of all files of the State Bar Court, and that the following is a full, true and correct copy of the minutes of the meeting of the Review Department held in Los Angeles, California on August 28-29, 1985, insofar as they relate to the above-entitled proceeding.

APPENDIX "B"

The following persons appeared before the Review Department in the above-entitled matter: Steven J. Rubin and Lori A. Toyama, co-counsel for Respondent Grey, Erica Tobachnik and R. Gerald Markle, co-examiners for the State Bar. Mavis Theodoro, C.S.R., Court Reporter, was also present.

Referee Craig stated that he was disqualified from participating in this matter and did not participate in the consideration or decision of this proceeding.

There being no appearance by or on behalf of Respondent Mark H. Oring, Lori King, Chief Deputy Clerk, Office of the State Bar Court, stated that if there were no objection, the Office of the Clerk of the

State Bar Court will make part of the record copies of the notices of Review Department hearing sent to Respondent Mark H. Oring. No objections were stated thereto.

In response to a question from Referee Hinerfeld as to whether the parties had any objection to Referee Hinerfeld participating in this matter although Mr. Ruben had represented Mr. Hinerfeld's firm about ten years ago in an unrelated matter, the parties stated that each had no objection to Mr. Hinerfeld participating in this matter.

Ms. Tobachnik and Mr. Ruben each addressed the Review Department and each answered questions put to them by members of the Review Department.

Mr. Markle also answered questions put to him by members of the Review Department.

Respondent David A. Grey entered the room during the argument of counsel above.

The matter was taken under submission by the Review Department.

* * *

This matter previously having been submitted, after discussion and consideration of the matter by the Review Department and upon motion made, seconded and adopted, it was

RESOLVED that the Review Department hereby adopts findings of fact as to Respondent David A. Grey:

FINDINGS OF FACT

1. Respondent, David A. Grey, was admitted to the practice of law in the State of California on December 18, 1975.

2. In or about 1981, Respondent engaged in a radio advertising program concerning Respondent's availability for professional employment.

3. One such radio "spot" consisted of a former client of Respondent, Sharon S., giving the following message:

"I was rear ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harrassed me, just all in all gave me a bad time. I contracted [sic] an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey & Oring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance company had

treated me and they wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I'd definitely go back to Grey & Oring. I certainly believe that."

Said message was followed by an announcer adding:

Grey & Oring. That's G-R-E-Y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

4. The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded.

5. The above quoted statements of Sharon S. constituted an endorsement of Respondent.

6. At the time the Respondent engaged in said radio advertising program, Respondent was aware the provisions of Rule 2-101,

adopted by the Board of Governors of the State Bar pursuant to Rule 2-101(D) of the Rules of Professional Conduct. Standard (2) states as follows:

"(a) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct."

7. The above quoted presumption adopted pursuant to Rule 2-101(D), Rules of Procedure of the State Bar, is constitutional as applied to Respondent David A. Grey.

Respondent failed to present evidence sufficient to rebut said presumption".

FURTHER RESOLVED that the Respondent, David A. Grey is hereby publicly reproved.

Voting Yes: Referees Dell'Ario, Lynch, Parkin, Vogt and Anderson.

Voting No: Referees Ching, Hinerfeld, Mackey, Reading.

Not Voting: Referees Craig, Kilpatrick, Orr.

Referee Hinerfeld stated as follows his reasons for voting no on the adoption of the foregoing

resolution: If there is any validity to the Constitutional analyses in Jacoby v. State Bar (1977) 19 Cal.3d 359 and in Bates v. State Bar of Arizona (1977) 433 U.S. 350, the kind of information that the public is likely to want incident to selecting a lawyer is truthful testimonial evidence from satisfied clients and fee and cost data. See, e.g., the first two sentences in Justice Mosk's opinion for the Supreme Court in Jacoby, supra, 19 Cal.3d at 362. See also, Jacoby, supra, 19 Cal.3d at 368: ("Petitioners have a right not only to respond to questions from the media on important issues, but also a right to seek out the media to express their views. Insofar as the present

proceedings effectively inhibit petitioners from speaking their mind on an important issue--the delivery of inexpensive legal services to middle income persons--they infringe on important First Amendment rights").

But concise fee information is generally misleading unless the law firm charges one price for every legal service which the public might request. The presumption against client testimonials will prevent the public from having the most reliable, concise indicator of the quality of a law firm's product.

If lawyers are effectively prohibited from giving concise,

useful data on their fees and on the quality of their work, advertising will be reduced to mindless repetition of law firm names, addresses, and telephone numbers which is what the lawyers were allowed to do in an alphabetical entry in the Yellow Pages before Jacoby and Bates.

That information does not distinguish one law firm from another. It is basically useless.

The rebuttable presumption against testimonials in lawyer advertising is invalid under the first amendment and the free speech provision in the California Constitution. It is irrational and unreasonably frustrates the

public's right to know which is guaranteed by both constitutional provisions.

Referee Ching stated the following reasons for voting no on the adoption of the foregoing resolutions: 1) The record contains insufficient evidence to sustain the findings of culpability; and 2) Presumption #2 is in conflict with other sections of Rule 2-101 Rules of Professional Conduct and therefore exceeds authority granted in Rule 2-101(D). As such, it amounts to conclusive presumption.

Dated: October 23, 1985

/s/
Judy Duffield, Clerk
of the State Bar Court

ORAL DECISION BY THE HEARING PANEL,

STATE BAR COURT OF THE STATE OF CALIFORNIA,

DISTRICT 7, DECEMBER 5, 1984

The Hearing Panel has met and has unanimously agreed that the Hearing Panel finds no culpability on either one of the respondents in this case, because Rule 2-101 is unconstitutional in two respects: first, because it shifts the burden of proof from the State Bar of bearing the burden of proof that the attorney has been quilty of unprofessional conduct, to the respondent's attorney, requiring him to disprove his culpability; secondly, because there is no standard in regard to what an attorney must or must not do in order to rebut any presumption of violation of rule 2-101.

This Hearing Panel need not and does not make a determination that the testimonial here involved is or is not misleading.

APPENDIX "C"

Supreme Court of the United States

No. A-253

DAVID ASHBURN GREY,

Applicant,

v.

CALIFORNIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including November 12, 1986.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 2nd day of October, 1986

RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

Rule 2-101. Professional employment

This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

(A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading to the public; or

(4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or

(5) State that a member is a certified specialist unless the member holds a certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

(B) No solicitation or "communication" seeking professional employment from a potential client for pecuniary gain shall be delivered by a member or a member's

agent in person or by telephone to the potential client, nor shall a solicitation or "communication" specifically directed to a particular potential client regarding that potential client's particular case or matter and seeking professional employment for pecuniary gain be delivered by any other means, unless the solicitation or "communication" is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A potential client includes a former or present client.

Notwithstanding the foregoing, nothing in this subdivision (B) shall limit or negate the continuing professional duties of a member or a member's firm to former or present clients, or a member's right to respond to inquiries from potential clients.

(C) A member or member's firm shall not solicit or accept professional employment offered or obtained through the acts of an agent, runner or capper, which acts would be in violation of law, or which, if performed by a member of the State Bar, would be in violation of subdivisions (A) or (B) of this Rule 2-101.

(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what "communications" will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. "Presumption affecting the burden of proof" means that presumption defined in Evidence

Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

(E) The member shall retain for one year a true and correct copy or recording of any "communication" made by written or electronic media pertaining to the member or the member's firm. Upon written request, the member or the member's firm shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar the evidence of the facts upon which any factual or objective claims contained in the "communication" are based.

DECLARATION OF SERVICE BY MAIL

I, Vicki S. Butler, declare as follows:

I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of eighteen years and not a party to the within entitled action. My business address is 2049 Century Park East, Suite 3160, Los Angeles, California 90067. On October 31, 1986, I served the within

PETITION FOR WRIT OF CERTIORARI
TO THE STATE BAR COURT OF CALIFORNIA

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

R. Gerald Markle, Esq.
Erica Tabachnik, Esq.
STATE BAR OF CALIFORNIA
1230 West Third Street
Los Angeles, California 90017

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 31st day of October, 1986 at Los Angeles, California.

Vicki S. Butler

VICKI S. BUTLER